Office of the Ombudsman

1999 Annual Report

For the period January 1, 1999 to December 31 , 1999

September 2000

The Honourable Dennis Schneider
Speaker of the Legislative Assembly
P.O. Box 2703
Whitehorse, Yukon
Y1A 2C6

Mr. Speaker:

I have the pleasure of presenting to you and through you to the Legislative Assembly the Annual Report of the Yukon Ombudsman and Information & Privacy Commissioner.

This report is submitted pursuant to Section 31(1) *Ombudsman Act* and Section 47(1), *Access to Information and Protection of Privacy Act.* The report covers the activities of the Office of the Ombudsman and the Information & Privacy Commissioner for the period January 1, 1999 to December 31, 1999.

Yours truly,

H Moorlag

Hank Moorlag
Ombudsman

Mission Statement

It is the objective of the Office of the Ombudsman to enhance public confidence and promote fairness and integrity in public administration of the Government of Yukon

YEAR IN REVIEW

The work of the Office of the Ombudsman during 1999 has been, in many respects, the most challenging since the office opened July 1, 1996. The office struggled to move investigations forward, but at year end our backlog of cases requiring formal investigation increased significantly over last year.

In my last annual report I commented on how difficult it has become to complete Ombudsman investigations in the face of a very substantial increase in the workload of the Information & Privacy Commissioner. This difficulty has continued and, despite some relief in our budget to contract out investigative work, the office has been unable to bring closure to files in a way that keeps pace with the incoming workload.

A total of 121 complaints were received in 1999 over which the Ombudsman had the jurisdiction to investigate. This compares to 144 complaints in 1998, a 15% decrease. This apparent decrease, however, is offset by the fact that 25 of the 121 complaints received resulted in decisions to conduct formal investigations. This compares to 14 in the previous year, a 78% increase.

At the 1998 year end, 24 investigations were carried forward. The 25 investigations opened in 1999 resulted in a total of 49 cases requiring formal investigation during the year. The office was able to bring closure to only 17 of these cases in 1999. As a consequence, 32 investigations were carried over to the year 2000, an increase of 33% in the number of such cases carried forward last year.

This increasing backlog of investigative work for the Ombudsman has brought with it expressions of serious concern from complainants and public officials, both of whom have a right to expect timely settlement of the complaints. Unfortunately, the resources of the Office of the Ombudsman have not been able to meet this expectation.

During 1999 the office was able to secure the services of two investigators to assist in completing four investigations on a contract basis. However, this supplementary work was not effective in reducing the backlog of investigations. In fact, despite these efforts, the backlog increased.

These considerations notwithstanding, the office was able to handle 96 complaints without requiring formal investigation. This is largely due to continuing efforts between the Office of the Ombudsman and the various government departments and agencies (referred to in the Ombudsman Act as "authorities") to foster and maintain effective working relationships so that complainants' concerns could be addressed through internal government review or some other means. I am pleased to report that authorities have, generally, become more receptive to responding to public complaints openly and making commitments to resolve them fairly in this way.

GOVERNMENT'S RESPONSE TO 1998 ANNUAL REPORT

In November 1999 the Cabinet approved the Yukon Government's response to the 1998 Annual Report of the Ombudsman. The response consists of an action plan with four new initiatives:

1. A "Service Quality Initiative" with employee focus group sessions to generate ideas about improving service quality from the service providers themselves.

2. A review of complaint handling procedures for front line staff to pinpoint and overcome departmental and government-wide gaps.

3. A plain-language review of non-regulatory forms to ensure that forms are straightforward and easily understood.

4. To begin a research phase for the development of a "Statement of Core Values" to determine the best process for engaging people in examining the government's organizational values and culture.

These initiatives respond to the following comments by the Ombudsman in last year's report:

- Government can do more to resolve disputes earlier in the process through intervention by first line managers and/or impartial reviews by higher levels of supervision.
- Complaints typically centre around a lack of communication.
- New ways of carrying out government business are creating situations in which public servants need to be highly attuned to ethical issues, but there may be too few guidelines for how they should act in response to these changes.
- The Government should accept the OECD Principles for Managing Ethics in the Public Sector.
- The government should ensure accountability mechanisms are built into contracted service arrangements in order to continue the public's right to review decisions and actions pursuant to the *Ombudsman Act* and the *Access to Information & Protection of Privacy Act.*

This response to the Ombudsman's Annual Report reflects the government's recognition that the Office of the Ombudsman can, through its work, contribute to improvements in public administration. The Ombudsman commends the Cabinet's leadership in putting these initiatives forward.

OMBUDSMAN AS SCREENER: INTERNAL TRADE AGREEMENT

In 1998 the Ombudsman was appointed a "screener" under Canada's Agreement on Internal Trade. The agreement, entered into by the federal, provincial and territorial governments, seeks to reduce and eliminate, to the extent possible, barriers to the free movement of persons, goods, services and investments within Canada. It also serves to establish an open, efficient and stable domestic market.

The function of the screener is to act as a body, independent of government, to decide whether persons should be permitted to commence dispute resolution proceedings under the agreement. Since the Ombudsman's appointment no cases have arisen.

CONFIDENTIALITY OF OMBUDSMAN INVESTIGATIONS

Members of the public often ask why they do not hear more, by way of media reports, of what the Office of the Ombudsman does, particularly on individual cases. This is a good question, one that raises the important issue of the Ombudsman's independence versus what some would suggest is part of government's requirement to be accountable to the public.

Section 10 of the *Ombudsman Act* says, in part:

> 10(5) An investigation under this Act shall be conducted in private unless the Ombudsman considers that there are special circumstances in which public knowledge is essential to further the examination.

The Ombudsman, and those performing duties for the Ombudsman, are required to take an oath of confidentiality, pursuant to Section 10 that prohibits disclosure of information unless in exceptional circumstances permitted by the *Ombudsman Act*. There is a good reason for these provisions.

The Ombudsman *must* be able to perform the duties of the office in a way that is independent. This means the examination of matters raised through complaints must be investigated without undue influence. The Ombudsman must be able to come to conclusions independently, not have the conclusions respond to the pressure of politics, public opinion, or even pressure from the complainant.

This confidentiality is also essential to effective investigation. When government authorities know that their communication with the Office of the Ombudsman is in confidence, there is a much greater likelihood that they will respond to an investigation openly, accurately and completely. If the information they provide was open to public scrutiny, authorities would become much more circumspect in their response, if not outright reluctant to cooperate.

It is within this "zone of confidentiality" that authorities can, and do in many cases, respond openly by acknowledging shortcomings where they exist, and exploring ways to correct mistakes rather than to deny making them. All this would not be possible without the confidentiality provisions of the *Ombudsman Act*.

The Office of the Ombudsman continuously strives to maximize the opportunities to resolve complaints within this investigative framework. I am pleased to report that authorities have become increasingly more willing to seek open and constructive dialogue as they become more confident that their open and complete disclosure of events and circumstances are kept private by the Office of the Ombudsman.

OPENNESS, ACCOUNTABILITY AND RESPONSIBLE PUBLIC SERVICE

Through the handling of public complaints the Office of the Ombudsman is uniquely positioned to examine, at least in specific situations, the extent to which government bureaucracy meets its responsibility to be open and accountable to the public it serves. The Ombudsman takes every opportunity to promote fairness and encourages authorities to be more open and accountable.

Such opportunities most often present themselves when the Ombudsman formulates recommendations to an authority following investigation. Section 23 of the *Ombudsman Act* states that where, after completing an investigation, the Ombudsman believes a decision, recommendation, act or omission that was the subject matter of the investigation was contrary to law, unjust, or otherwise wrong, the Ombudsman shall report his opinion and make whatever recommendations he considers appropriate.

In addition to making recommendations to correct errors, the Ombudsman has adopted the practice of recommending, in cases where the investigation reveals errors in administration, that the authority explain, in writing to the complainant, what went wrong and why. Additionally, the Ombudsman will recommend that the authority inform the complainant of what changes have been, or will be made in administrative procedures as a result of the Ombudsman investigation.

In one case during the past year, an authority objected to accepting and implementing such a recommendation. The authority questioned the Ombudsman's power under the *Ombudsman Act* to make a recommendation of this nature. It also objected to giving effect to the recommendation because it believed doing so would be an admission of negligence, a natural result of which would be civil litigation. The authority believed it had a responsibility to manage the avoidance of such a risk.

The Ombudsman responded that the authority's concern about litigation would not persuade him to withdraw or modify the recommendation. On the matter of whether there was authority in the *Ombudsman Act* to make the recommendation, the Ombudsman expressed the opinion that providing the complainant with a complete explanation meets a reasonable standard of openness, accountability and responsible public service and therefore is an "appropriate" recommendation within the context of

Section 23. However, continued efforts, over a six month period, to persuade the authority to give proper effect to the recommendation were unsuccessful.

Section 25(1) of the *Ombudsman Act* states that if no suitable action is taken by an authority, the Ombudsman "may submit a report of the matter to the Commissioner in Executive Council" and, after that, "may make such report to the Legislative Assembly respecting the matter, as he considers appropriate". The Ombudsman therefore submitted a Special Report to the Commissioner in Executive Council with a request that the executive level of government address the Ombudsman's concern that the authority in this case had failed to take suitable action on the recommendation.

The following day the authority sent a letter to the complainant with a full and complete explanation related to the subject matter of the complaint. The authority also informed the complainant of the specific changes it had made, and planned to make to its administrative procedures to prevent a recurrence. Interestingly, the authority's letter of explanation has not resulted in civil litigation by the complainant against the authority.

In making the Special Report to the Commissioner in Executive Council, the Ombudsman reinforced these important principles:

- The *Ombudsman Act* gives the public a right to an independent review of their complaints, and a right to be informed of the results.
- The measure of a democratic government's maturity is that it not just tolerates, but welcomes the independent review of its decisions and actions.
- There is a significant opportunity to bring about positive change in public administration through an independent review mechanism.

OPPORTUNITIES FOR THE EARLY RESOLUTION OF COMPLAINTS

Over the past year the Office of the Ombudsman has increased its efforts to settle complaints without relying on the full formal process of investigation, interim report and final report with recommendations, to the authority (please refer to the flow chart on page XX).

Subsections 15(2) and (3) of the *Ombudsman Act* make special provisions for the early resolution of complaints, as follows:

> 15(2) The Ombudsman may at any time during or after the investigation consult with an authority to attempt to settle the complaint, or for any other purpose.
> 15(3) Where before the Ombudsman has made his decision respecting a matter being investigated, he receives a request for consultation from the authority, he shall consult with the authority.

The benefits of making our best efforts to resolve complaints in this way are:

1. complaints can be settled in a timely way;
2. the authority can participate in the complaint resolution process in a positive, proactive way;
3. it maximizes opportunities for an open examination of administrative procedures and increases potential for making appropriate changes in public administration to prevent recurrence; and
4. it avoids the often long and arduous process of negotiating the implementation of the Ombudsman's recommendations when such recommendations are based on the formal investigation process alone.

The key to the successful resolution of complaints using the provisions of Section 15, or other proactive means, is an acknowledgement on the part of the authority that the complaint has validity; that it points to shortcomings in administrative procedures, and that there is benefit to a thorough review. Several cases have been resolved over the past year in this way.

In one such case the Department of Justice agreed that administrative procedures related to the application of lottery licensing fees could be improved. Following the investigation of a complaint, the Ombudsman provided the authority with an interim letter containing proposed recommendations to clarify licensing requirements in its communication with potential licensees, and to provide clear definitions of gaming terminology in its printed information material.

The authority readily accepted the recommendations and outlined how it would give the recommendations effect. This action by the authority avoided the necessity of preparing a final Ombudsman report and the matter was concluded.

In another case related to a complaint about procedures at the Whitehorse Correctional Centre, the details of a complaint were outlined to the Deputy Minister of Justice and the Superintendent of the Correctional Centre. Following consultation, the Superintendent undertook a complete internal review of administrative procedures, centered around the issues raised by the complaint. The Superintendent prepared a report following his review, complete with an action plan to correct identified deficiencies.

An acknowledgement of administrative error, and information about corrective action was communicated to the inmate who made the complaint, in keeping with the principle of accountability. In this case, the authority resolved the matter without the need for a formal Ombudsman investigation. Additionally, the authority was able to examine its own policies and procedures, taking a broader systemic focus than the specific details of the complaint. Corrective action was therefore wider in scope than what may have been possible through an Ombudsman investigation.

A case involving the Department of Education related to a complaint that the process for hiring new teachers was unfair. Investigation by the Ombudsman determined that the susbstantive part of the complaint was not substantiated. However, the Ombudsman was of the view that the hiring process did not meet accepted standards of openness and accountability. It was the Ombudsman's opinion that this lack of transparency and accountability led to the complainant's perception of unfair treatment.

The Ombudsman's opinion was communicated to the authority in an interim letter with proposed recommendations that the authority review its hiring practices and make changes to improve openness and accountability. The authority responded with a complete acceptance of the recommendations and its intent to give the recommendations effect in time for the Spring 2000 recruitment cycle.

Two cases involving the Yukon Housing Corporation were concluded through recognition by the authority that an independent review of its administrative processes is of significant benefit. In one case a complainant felt there was an unfair denial of an application under a Yukon Housing program. While the substantive issue of the complaint was not substantiated, the Ombudsman found that some aspects of the application process, particularly in relation to the Corporation's communication with applicants, did not meet standards of fairness.

Following investigation, the Ombudsman consulted with the authority. The Corporation readily agreed to change the screening process for applications, improve its communication during the application process, and provide more clearly the reasons for its decisions. The authority's immediate cooperation and agreement to inform the complainant, in writing, of the changes it made to its administrative procedures, made a final report by the Ombudsman unnecessary.

The second case involving the Yukon Housing Corporation is also an example of how a proactive, open approach to resolving complaints through consultation can be effective. A senior with limited mobility complained that the Whitehorse Housing Authority was not providing safe accommodation to meet special needs. The Ombudsman's investigation found the complainant was housed in a non-Whitehorse Housing Authority unit. Therefore, the complainant's application for a transfer to a more suitable unit could not be approved. Although the complaint was technically unsubstantiated, the Ombudsman found that the Whitehorse Housing Authority's decision, and the criteria for unit allocation had not been well communicated to the complainant. This had resulted in frustrating the complainant unnecessarily in the opinion of the Ombudsman.

Not only did the Whitehorse Housing Authority make immediate adjustments to its administrative procedures related to this complaint, its parent agency, Yukon Housing Corporation, undertook a comprehensive review of procedures territory-wide. The Yukon Housing Corporation subsequently advised the Ombudsman of its continuing efforts to develop a new Housing Administration Manual to incorporate changes flowing from the process triggered by this investigation.

REVIEW OF A FIRST NATION GOVERNMENT POLICY

Section 11(5) of the *Ombudsman Act* states that a municipality or a Yukon First Nation government may at any time refer a matter to the Ombudsman for investigation and report.

In 1999 the Ombudsman was requested by five First Nation governments to conduct a review of their housing policies. Administrative procedures in the policies were compared to generally accepted standards of administrative/procedural fairness with a focus on the principles of natural justice.

The Ombudsman recognized the First Nations' desire to identify opportunities for modifying the administration of their policies so that some appropriate cultural practices might be included, rather than relying solely on a rigid bureaucratic model.

Recommendations were included with the reports for consideration by the First Nations. The recommendations were informal with no requirement to account to the Ombudsman for how they would be given effect.

OMBUDSMAN'S FLOW CHART OF COMPLAINTS

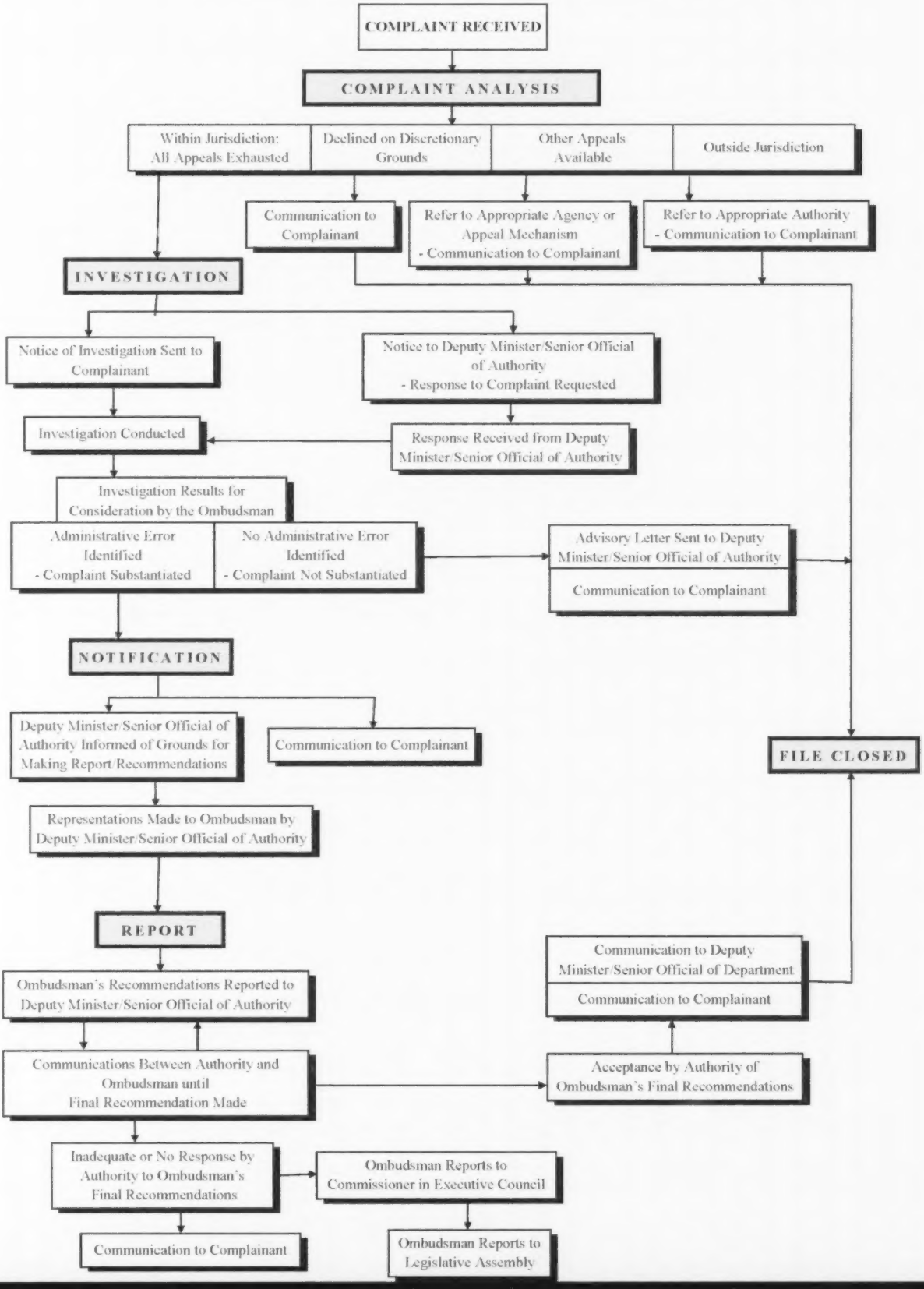
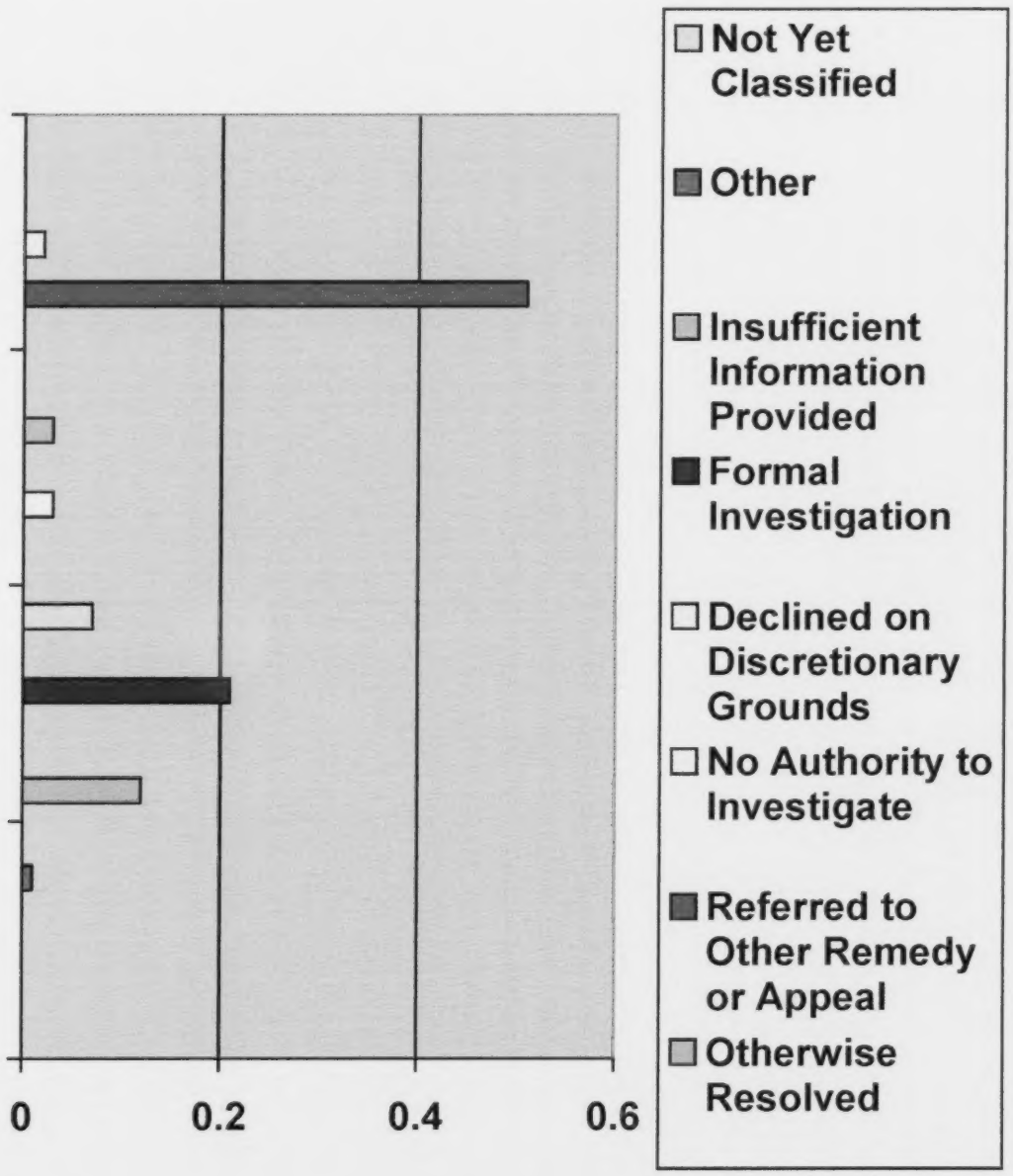

COMPLAINT RECEIVED
COMPLAINT ANALYSIS
Within Jurisdiction: All Appeals Exhausted
Declined on Discretionary Grounds
Other Appeals Available
Outside Jurisdiction
Communication to Complainant
Refer to Appropriate Agency or Appeal Mechanism - Communication to Complainant
Refer to Appropriate Authority - Communication to Complainant
INVESTIGATION
Notice of Investigation Sent to Complainant
Notice to Deputy Minister/Senior Official of Authority - Response to Complaint Requested
Investigation Conducted
Response Received from Deputy Minister/Senior Official of Authority
Investigation Results for Consideration by the Ombudsman
Administrative Error Identified - Complaint Substantiated
No Administrative Error Identified - Complaint Not Substantiated
Advisory Letter Sent to Deputy Minister/Senior Official of Authority
Communication to Complainant
NOTIFICATION
Deputy Minister/Senior Official of Authority Informed of Grounds for Making Report/Recommendations
Communication to Complainant
FILE CLOSED
Representations Made to Ombudsman by Deputy Minister/Senior Official of Authority
REPORT
Communication to Deputy Minister/Senior Official of Department
Communication to Complainant
Ombudsman's Recommendations Reported to Deputy Minister/Senior Official of Authority
Communications Between Authority and Ombudsman until Final Recommendation Made
Acceptance by Authority of Ombudsman's Final Recommendations
Inadequate or No Response by Authority to Ombudsman's Final Recommendations
Ombudsman Reports to Commissioner in Executive Council
Communication to Complainant
Ombudsman Reports to Legislative Assembly

Table 1 – Jurisdictional Complaints Received

Authority	Complaints Under Investigation	Complaints Otherwise Resolved	Total Complaints
Community & Transportation Services	7	6	13
Economic Development	1		1
Education	2	7	9
Finance	1		1
Government Services	1	1	2
Health and Social Services	2	19	21
Human Rights Commission		1	1
Justice	1	5	6
Public Service Commission	3	3	6
Renewable Resources		4	4
School Council	1		1
Whitehorse Correctional Centre	1	31	32
Yukon Energy Corporation		1	1
Yukon Housing Corporation	1	1	2
Yukon Workers' Compensation Health and Safety Board	4	17	21
TOTAL COMPLAINTS 1999	**25**	**96**	**121**
Total Complaints1998	14	131	144

TABLE 4 - RESOLUTION OF OMBUDSMAN COMPLAINTS



ACTIVE OMBUDSMAN INVESTIGATIONS

Opened in 1999	25
Carried forward from 1998	24
Total Open	**49**
Reported to Authority	11
Discontinued	6
Total Completed	**17**
Carried forward to 2000	**32**